IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

MISSOURI PACIFIC RAILROAD COMPANY,

Appellant,

vs.

HAL NORWOOD, Attorney-General of the State of Arkansas; JOE JOINER, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, and CHESTER HOLLAND, Prosecuting Attorney for the Twelfth Circuit of Arkansas,

Appellees.

No. 193.

Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S MOTION TO MODIFY MANDATE.

To the Honorable, the Supreme Court of the United States:

The undersigned, with respect, desires to make the following suggestions, in the nature of a petition for modification of the mandate issued by the Court in the above-entitled cause:

I.

Appellant presents to the Court that its action is a suit in equity to enjoin the Attorney-General and the Prosecuting Attorneys of two circuits of the State of Arkansas from the enforcement of statutes of that state regulating freight-train crews and switching crews, upon the allegation that said statutes are repugnant to the Constitution and laws of the United States; that the three-judge court, wherein the appellant's application for a temporary injunction was heard, sustained the appellee's motion to dismiss said cause, and held that the complaint was insufficient to show any ground for relief in equity, and entered an order dismissing the case.

II.

That upon submission of said cause upon said petition and motion to dismiss and the briefs of appellant and appellees, this Court, in an opinion rendered April 13, 1931, affirmed the judgment and decision of the three-judge court holding appellant's petition was insufficient to show any ground for relief, and in the course of its opinion in this cause this Court found that

> "there is no showing that the dangers against which these laws were intended to safeguard employes and the public no longer exist or have been lessened by the improvements in road and equipment, or by the changes in operating conditions there described. And,

> for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. * * * While costs of complying with the state laws enacted to promote safety is an element properly to be taken into account in determining whether such laws are arbitrary and repugnant to the due-process clause of the Fourteenth Amendment (Lehigh Valley R. R. Co. v. Commissioners, 278 U. S. 23, 34; Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, 529), there is nothing alleged in that respect which is sufficient to distinguish this case from those in which we have upheld the laws in question."

And this Court, in its order, proceeded to affirm the decree of the three-judge court dismissing the appellant's bill, and in the mandate sent down by the clerk of this court to the three-judge court this Court ordered said Court to dismiss the appellant's bill without expressly affording the appellant an opportunity to file an amended bill, and set forth the facts which furnished the basis for this Court's opinion, that said statutes were not arbitrary and repugnant to the due-process clause of the Fourteenth Amendment.

III.

And appellant respectfully presents to the Court that said mandate should be modified by direction to said three-judge court to permit the appellant to amend its peti-

tion in the interest of justice, if said three-judge court should find that such amendment were necessary in order to properly present the fact that the employes of the appellant and the public are properly safeguarded under present operating conditions without the extra brakemen and extra switchmen provided for by said laws, and that, in truth and in fact, the improvements in road and equipment and the changes in operating conditions which have been adopted by the appellant since said laws were upheld by this Court rendered the employment of the third brakeman and third switchman no longer necessary for the safe operation of the appellant's trains and switch engines in the State of Arkansas, in order that the appellant may thus properly have the three-judge court consider the facts in determining its claim under the Constitution of the United States that such laws are arbitrary and repugnant to the due-process clause of the Fourteenth Amendment.

IV.

That in truth and in fact, under the amendments to the Federal Safety Appliance Act since said laws were enacted, on February 17, 1911, March 14, 1915, and June 7, 1924, it has been unlawful for any common carrier to use any locomotives which are not equipped with power brakes which can be operated from the engine, or any cars not equipped with air brakes and automatic couplers, and under and in pursuance of said Federal Safety Appliance

Act, as amended since said laws were enacted, the Interstate Commerce Commission, on June 6, 1910, entered an order requiring 85 per cent of all the cars used on all freight trains to be equipped with automatic couplers and air brakes, and since said date, on April 27, 1923, as a result of tests made by the Interstate Commerce Commission of different automatic and air-brake controlled devices, the said Interstate Commerce Commission, by its order entered July 18, 1924, provided that all power brakes used upon freight cars by the carriers engaged in interstate commerce in the United States should be provided with means whereby emergency brake application could be obtained immediately following a full service brake application, and said Commission ordered that all power brake systems must provide adequate means whereby an engineman could control the release of the brakes by graduated steps, and said Commission prescribed full specifications and requirements covering the maintenance and operation of power brakes and appliances intended to safeguard the employes in the operation of freight trains in the United States.

And appellant respectfully presents to the Court that it has fully complied with the orders of the Interstate Commerce Commission and the said Federal Safety Appliance Acts, as amended, since said laws were enacted by the State of Arkansas, and now all of the appellant's engines operated in said state are equipped with safety devices, so that the speed of freight trains and the starting and stop-

ping of the same upon the appellant's railroad is entirely under the control of the men operating its engines.

That the provisions of the Arkansas Law of 1907, requiring a third brakeman upon trains of twenty-five cars or more, were intended to require the same number of brakemen that were employed when hand-brakes were wholly used in the operation of freight trains and when link-and-pin couplers were in general use upon the freight trains operated upon the railroads in said state.

That with the improvements which have now been adopted by the appellant upon its engines and freight cars under and in pursuance of the Federal Safety Appliance Laws of the United States, as amended since said Arkansas statutes were enacted, and the orders and regulations of the Interstate Commerce Commission in pursuance thereto requiring air brakes regulated entirely from the engine and automatic couplers and other safety appliances, said hand-brakes and said link-and-pin couplers which were in use at the date when third brakemen were generally employed upon the railroads in said state have now been wholly superseded upon appellant's freight trains, and the employment of a third brakeman upon any of said trains is now wholly unnecessary, and the provisions of said law are obsolete and will perform no useful function, either as to safety or attaining any other useful object as applied to the operation of the appellant's freight trains or those of the other railroads operated into and through the State of Arkansas.

That the use of said safety appliances with which all of the appellant's engines and freight cars have been equipped since the enactment of said statutes requiring power brakes on all cars precludes, as a matter of safety, the use of hand-brakes and link-and-pin couplers in the operation of freight trains upon appellant's railroad in the State of Arkansas, and, under the conditions now existing in said state upon appellant's railroad, the control of the speed of freight trains and the starting and stopping of said trains upon appellant's railroad in said state are entirely under the control of the men operating engines that pull said trains, and the only office performed by the brakemen on said trains, with reference to stopping and starting of trains, is to give the proper signal to the enginemen, or, in cases of emergency, when for any reason the enginemen do not observe the signal, the train may be stopped by the conductor's valve located in the caboose. That the effective working of said air brakes is made apparent by an air-pressure gauge placed upon the wall of the caboose used in all of the appellant's freight trains in said State of Arkansas, immediately in front of the brakeman's seat in the cupola of said caboose, and said air-pressure gauge is clearly visible from the floor of said car.

That said law was enacted to provide for the employment of the same number of brakemen employed when freight cars were equipped with hand brakes and link-and-pin couplers, and before freight engines were equipped

with the safety appliances aforesaid and freight cars with the air brakes, which completely avoid the necessity for a third brakeman upon the appellant's freight trains in the State of Arkansas.

And appellant further respectfully presents to the Court that the said Arkansas Law of 1913 requiring a third helper on all switch engines where switching or transferring of cars is made across public crossings is the only law in the United States where such a provision maintains; that it is wholly unnecessary, and the object of said law was intended solely to provide for a third helper or switchman in the switching and transferring of cars in said state, although the safety and skillful operation of switch movements does not require the employment of said third helper or switchman.

That the standard rules of the American Railway Association, which are in use upon all of the railroads in the United States and which are rigidly enforced, provide as follows:

> "When cars are pushed by an engine, except when shifting or making up trains in yards, the trainman must take a conspicuous position on the leading car, and, when shifting over public crossings at grade not protected by a watchman or gates, a member of the crew must protect the crossing."

That this rule is strictly adhered to upon the appellant's railroad in the State of Arkansas, and said rule

fully protects the public in the use of crossings without the use of the third helper or switchman required by said law.

That the standard agreement in effect in all the states through which the appellant operates with its yardmen provides that:

> "A yard crew shall consist of not less than a foreman and two helpers."

That under said rules, and with the use of the improved appliances now used by the appellant in the operation of its freight cars and switch engines in the State of Arkansas, the necessity for said extra-switchmen law of 1913 has been wholly obviated, and said law does not in any manner minimize the injuries to persons in said state.

V.

And appellant respectfully presents that it is in the interest of justice and equity that the appellant be permitted to set up the aforesaid facts in an amended petition in this cause to the end that said cause may be finally determined by the three-judge court upon a full and fair consideration of the facts and present conditions which were not pleaded or fully set forth in appellant's petition adjudged insufficient by this Court.

That upon a consideration of said cause upon the facts and equities under an amended petition setting up the

facts and true conditions as they now exist, said statutes as applied to the operation of the appellant's railroad in the State of Arkansas should be adjudged unreasonable and arbitrary, and contrary to the Fourteenth Amendment to the Constitution of the United States, in that said statutes compel an expenditure annually of $600,000.00 per year by the appellant, without any corresponding benefit or advantage to the appellant, because said statutes are not necessary to conserve the interests or safety of appellant's employes or the public of the State of Arkansas.

VI.

And appellant further presents that it is consistent with the practice of the federal courts of equity to permit an amendment where material facts have not been alleged with sufficient precision in the bill even after a trial and final disposition of said cause; or where, for any reason, the bill was imperfect in substance or the rights of the parties were not determined upon the merits, this Court may award an amendment or repleader after judgment has been rendered, an appeal heard in this cause and the cause reversed and remanded by this Court.

Wells Fargo vs Taylor 254 U.S. 175

Garland v. Davis, 4 Howard 131, 11 L. Ed. 907;
Snyder v. Rosenbaum, 215 U. S. 261;
Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590.

VII.

And appellant respectfully presents to the Court that it is consistent with the practice established in this court to modify its mandate in the furtherance of justice in equity cases, in order to permit the filing of an amended petition fully presenting the facts and equities of the parties in order that a right claimed under the Constitution of the United States may be fully considered and disposed of upon the facts.

U. S. v. Reading, 228 U. S. 158;
Bank of Commerce v. Bank of Tennessee, 163 U. S. 416;
Smyth v. Ames, 171 U. S. 362.

And, to the end and that this cause may be finally considered and adjudicated upon the facts as they really exist, rather than upon the imperfect case made by the appellant's petition, appellant presents that the three-judge court before whom this cause is pending should be left free to allow an amendment of the petition consistent with the facts, as this Court in such cases has ruled that:

"We are generally inclined to refer applications of this kind to the court of three judges, who have heard the whole matter, have read the record and can pass on the issue without additional labor."

Cumberland Telephone Co. v. Public Service Commission, 260 U. S. 219;
Southern Ry. Co. v. Watts, 259 U. S. 576.

Wherefore, to the end that appellant may ultimately have its day in court upon a full presentation of the facts in this cause, appellant prays that the mandate of this Court may be modified so that the appellant, if advised, may file an amended petition in this cause and the three-judge court may hear and consider the same, for which appellant will ever pray.

Respectfully submitted,

THOMAS B. PRYOR and
EDWARD J. WHITE,
Solicitors for Complainant and Appellant.

We certify that the foregoing motion is well founded and is not made for the purpose of delay.

THOS. B. PRYOR and
EDW. J. WHITE.

I acknowledge receipt of a copy of this motion.

Hal L. Norwood,
Attorney-General, State of Arkansas.

5/16/31

SUPREME COURT OF THE UNITED STATES.

No. 193.—October Term, 1930.

Missouri Pacific Railroad Company, Appellant,
vs.
Hal Norwood, Attorney General of the State of Arkansas; Joe Joiner, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, et al.

Appeal from the District Court of the United States for the Western District of Arkansas.

[April 13, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

The company sued the attorney general and the prosecuting attorneys of two circuits of Arkansas to enjoin the enforcement of statutes of that State regulating freight train crews and switching crews upon the claim that they are repugnant to the Constitution and laws of the United States. On the complaint and supporting affidavits the plaintiff applied for a temporary injunction. Defendants moved to dismiss. The court, consisting of a circuit judge and two district judges, held the complaint insufficient to show any ground for relief and dismissed the case. 42 F. (2d) 765.

The statutes so assailed are Laws, 1907, Act 116, and Laws, 1913, Act 67 (§§ 8577-8579 and 8583-8586, Crawford & Moses' Digest, 1921) which so far as here material are printed in the margin.[1]

[1]Arkansas Laws, 1907, Act 116, provides:

"Section 1. No railroad company . . . owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three brakemen, . . .

"Section 2. This Act shall not apply to any railroad company . . . whose line or lines are less than fifty miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five cars . . .

"Section 3. Any railroad company . . . violating any of the provisions of this Act shall be fined for each offense not less than one hundred

The earlier Act requires railroad carriers whose lines are not less than 50 miles in length to have not less than three brakemen in every crew of freight trains of 25 cars or more. The later Act requires not less than three helpers in switch crews in yards in cities of the first and second class operated by companies having lines of 100 miles or more.

The complaint asserts that each of these Acts violates the commerce clause of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment and is repugnant to the Interstate Commerce Act as amended in 1920[2] and to the Railway Labor Act.[3] But they have been held valid by this court as against the claim of repugnancy to these clauses of the Constitution. See *Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453, 459, 465, affirming 86 Ark. 412, as to the Act of 1907, and *St. Louis & Iron Mtn. Ry.* v. *Arkansas*, 240 U. S. 518, affirming 114 Ark. 486, as to the Act of 1913.

The first of these cases was decided in 1911. The court held that the Act of 1907 is not a regulation of interstate commerce and that upon its face it must be taken as having been enacted in aid of, and for the protection of those engaged in, such commerce. It said that Congress might have taken entire charge of the subject, but that it had not done so and had not enacted regulations in respect of the number of employees to whom might be committed the management of interstate trains and that until it does the statutes of the State, not in their nature arbitrary,

---

dollars nor more than five hundred dollars, and each freight train so illegally run shall constitute a separate offense. . . ."

Arkansas Laws, 1913, Act 67, provides:

"Section 1. That no railroad company . . . owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch . . . crews with less than one engineer, a fireman, a foreman and three helpers.

"Section 3. The provisions of this Act shall only apply to cities of the first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred miles in length.

"Section 4. Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars and each crew so illegally operated shall constitute a separate offense."

[2] U. S. C., Tit. 49.

[3] U. S. C., Tit. 45, §§ 151-163.

must control. The court found that, while under the evidence there was admittedly room for controversy as to whether the statute was necessary, it could not be said that it was so unreasonable as to justify the court in adjudging it an arbitrary exercise of power. And it held that, being applicable alike to all belonging to the same class, there was no basis for the contention that it denied the company equal protection of the laws. The principles governing that decision were followed in the later case, decided in 1916, which upheld the Act of 1913. Both Acts were sustained as valid exertions of police power for the promotion of safety of employees and others.

The plaintiff says that, since these decisions, Congress has occupied the field and has delegated to the Commission and Labor Board full authority over the subject and that the state laws under consideration are repugnant to the comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act as amended and conflict with §§ 1 (10) and (21), 13, 15 and 15a thereof and with the spirit of the Railway Labor Act of 1926.

It maintains that the allegations of the complaint together with the facts set forth in the affidavits show that, when applied to operating conditions on its lines in Arkansas, these state laws are arbitrary and violative of the Federal Constitution and laws. But the affidavits filed in support of the application for a temporary injunction may not be considered in determining whether the complaint states facts sufficient to constitute ground for relief. *Leo* v. *Union Pac. Ry. Co.*, 17 Fed. 273. *United States* v. *Marine Engineers' Ben. Ass'n No. 38*, 277 Fed. 830, 834. *McGregor* v. *Great Northern R. Co.*, 42 N. D. 269, 280.

The substance of the pertinent allegations of the complaint follows:

Present railroad operating conditions on plaintiff's railroad in Arkansas and elsewhere, and on railroads generally in this country, differ from those that existed in 1907 and 1913 when these laws were passed. Roads and equipment have been so improved that longer and heavier trains may be operated more safely now than much smaller trains could then be operated. It is standard practice of railroads "wherever the density of traffic is sufficient, except in the State of Arkansas, to operate freight and passenger trains and switch engines with crews consisting of less than the

extra switchmen [meaning one less than required by the 1913 Act] and extra brakemen [meaning one less than required by the 1907 Act] provided by the Arkansas laws."

Freight trains and switch engines are safely operated on lines similar to those of plaintiff "wherever the traffic and circumstances make such operation advisable, without such extra switchmen and extra brakemen". By increasing lengths of their freight trains, the plaintiff and other railroads in States "where such extra brakemen and extra switchmen are not [by law] required" have been able to effect great economies. But by the Arkansas laws plaintiff is compelled there to employ more than the standard crew and to pay for services and time not needed or used for the operation of its freight trains.

The standard agreement between plaintiff and the Brotherhood of Railroad Trainmen provides for a switch crew consisting of a foreman and two helpers and "also provides for a . . . freight train crew, in through and irregular freight service, of a conductor and two brakemen". Other railroads have similar agreements with the Brotherhood "with the exception of the service in States with laws similar to the above laws of the State of Arkansas".

And it is alleged that, if plaintiff were permitted to operate its freight trains without the extra brakemen required by the Act of 1907, its expenses would be reduced by $350,000 per year; and, if permitted to operate its switch engines without the extra helper required by the Act of 1913, its expenses would be reduced $250,000 per year.

The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25, 43. *Southern Ry. Co.* v. *King*, 217 U. S. 524, 536. *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498, 500. The state laws are presumed valid. Moreover, in the cases here decided they were held not repugnant to the commerce clause of the Constitution or the due process or equal protection clause of the Fourteenth Amendment. The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity. *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447, and cases there cited. *N. O. Public Service* v. *New*

Orleans, 281 U. S. 682, 686. *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 88.

There is no showing that the dangers against which these laws were intended to safeguard employees and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. It is not made to appear that the expense of complying with the state laws is now relatively more burdensome than formerly. Greater train loading tends to lessen operating expenses for brakemen. There is no statement as to present efficiency of switching crews compared with that when the 1913 Act was passed, but it reasonably may be inferred that larger cars and heavier loading of today make for a lower switching expense per car or ton. While cost of complying with state laws enacted to promote safety is an element properly to be taken into account in determining whether such laws are arbitrary and repugnant to the due process clause of the Fourteenth Amendment, (*Lehigh Valley R. R.* v. *Commissioners*, 278 U. S. 24, 34. *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 529), there is nothing alleged in that respect which is sufficient to distinguish this case from those in which we have upheld the laws in question. And the claim that "standard" crews are generally employed by the railroads of the United States is substantially impaired by the qualified form of the allegations and also by the fact, which we judicially notice, that other States have laws somewhat similar to the Arkansas Act in question.[4] It is clear that, so far as constitutionality is concerned, the

[4] Arizona Revised Code (1928) §§ 649-651. [Laws 1912, c. 16.]

California Laws 1915, c. 501, amending c. 49, 1911, as amended 1913, c. 168.

Maine Revised Statutes (1930), c. 64, § 60. [Laws 1842, c. 9, § 3.]

Mississippi Laws 1930, c. 219, amending c. 170, 1914.

Nebraska Compiled Statutes (1929) c. 74, §§ 519-524. [Laws 1909, p. 405, 1913, p. 157.]

Nevada Revised Laws (1919), §§ 3588-3596. [Stats. 1913, p. 62, repealing Act of March 8, 1909, and Act of February 21, 1911, as amended March 28, 1911.]

New York Consolidated Laws, c. 50, § 54a. [Laws 1913, c. 146, as amended by Laws 1921, c. 290.]

facts alleged are not sufficient to distinguish this case from those in which this court has sustained these laws.

Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?

In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews. *Reid* v. *Colorado*, 187 U. S. 137, 148. *Savage* v. *Jones*, 225 U. S. 501, 533. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611. Plaintiff, while not claiming the Interstate Commerce Act in terms purports to cover that subject, insists that the Act does give the Commission jurisdiction over freight train and switching crews and so excludes the States from that field. It calls attention to a number of provisions of the Act and maintains that under them the Commission is empowered to regulate the "practice" of carriers in respect of the "supply of trains" to be provided by any carrier. But, assuming that the Act does so authorize regulation in respect of such practice and supply, it is clear that the delegation of power would not include the regulation of the number of brakemen or helpers. The Act uses the word "practice" in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers, but these matters differ widely in kind from the subject covered by the Arkansas laws. That word is deemed to apply only to acts or things belonging to the same class as those meant by the words of the law that are associated with it. *B. & O. R. R.* v. *United States*, 277 U. S. 291, 300. The Act does not use that word in respect of any subject that reasonably may be thought similar to or classified with the regulation of the number of men to be employed in such crews. And it is also clear that there is nothing in the phrase "supply of trains" or in the purpose of the Act to suggest

---

North Dakota Civil Code, §§ 4667a1-4. [Laws 1919, c. 169.]
Ohio Throckmorton's Annotated Code (1930), §§ 12553-12557 (3).
Oregon Code (1930), Tit. 62, §§ 1401-1403. [Laws 1913, c. 162.]
Texas Revised Civil Statutes (1925), Art. 6280. [Acts 1909, p. 179.]
Washington Pierce's Code (1929), §§ 5674-5678. [Laws 1911, p. 650.]
Wisconsin Statutes (1929), §§ 192.25 [1907, c. 402] and 192.26 [1913, c. 62].
§§ 1 (3) (10) (11) (12) (13) (14) (21), 13, 15, 15a.

that by it Congress intended to supersede state laws like those under consideration. The plaintiff further supports its contention by the claim that the Commission is authorized to regulate the expenditures of carriers. That claim is based on the provisions of the Act empowering the Commission to regulate rates to be charged and divisions of joint rates and to ascertain rate levels that will yield the fair return provided for. But manifestly there is no similarity between determining what items of expense properly are to be taken into account in calculations made for such purposes and in the prescribing of the number of employees or the compensation to be paid them. We think it very clear that Congress has not prescribed or empowered the Commission to fix the number of men to be employed in train or switching crews.

No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END OF CASE